No. 77-1359

In the Supreme Court of the United States

OCTOBER TERM, 1977

UNITED STATES OF AMERICA, PETITIONER

v.

KIMBELL FOODS, INC., ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

WADE H. McCREE, Jr.,
Solicitor General,
BARBARA ALLEN BABCOCK,
Assistant Attorney General,
MARION L. JETTON,
Assistant to the Solicitor General,
THOMAS G. WILSON,
Attorney,
Department of Justice,
Washington, D.C. 20530.

INDEX

CITATIONS

Cases:

257-715—78——1

Cases—Continued

Statutes:

Statutes—Continued

Miscellaneous:

In the Supreme Court of the United States

OCTOBER TERM, 1977

No.

UNITED STATES OF AMERICA, PETITIONER

v.

KIMBELL FOODS, INC., ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Solicitor General, on behalf of the United States of America, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*, pp. 1A–29A) is reported at 557 F. 2d 491. The opinion of the district court (App. C, *infra*, pp. 31A–53A) is reported at 401 F. Supp. 316.

JURISDICTION

The judgment of the court of appeals (App. B, *infra*, p. 30A) was entered on August 12, 1977. A petition for rehearing was denied on October 25, 1977

(App. D, *infra*, p. 54A). On January 16, 1978, Mr. Justice Powell extended the time within which to file a petition for a writ of certiorari to and including March 24, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether a private lien that has not attached to the property and become choate before a federal lien attaches takes precedence over the federal lien.

STATEMENT

1. In February 1969 O K Super Markets, Inc., a Dallas supermarket chain, borrowed $300,000 from Republic National Bank of Dallas (App. C, *infra*, p. 34A). The Small Business Administration guaranteed 90 percent of this loan, as it is authorized to do by Section 7(a) of the Small Business Act, 72 Stat. 384, 387, as amended, 15 U.S.C. 636(a), when the "financial assistance applied for is not otherwise available on reasonable terms" from non-federal sources.[1] The financing statement executed by O K Super Markets granted the bank a security interest in all the debtor's machinery, equipment, fixtures, and inventory; the statement was filed with appropriate state officials on February 18, 1969 (App. C, *infra*, p. 34A).

O K Super Markets had executed three earlier security agreements with Kimbell Foods, Inc., in August

[1] Efforts by the bank and the Small Business Administration to have larger creditors of O K Super Markets guarantee parts of this loan had been unsuccessful (App. C, *infra*, p. 34A).

1966, April 1968, and November 1968.[2] O K received advances on inventory and gave a general security interest in the stores' equipment, fixtures, goods and merchandise (App. A, *infra*, p. 2A). Each agreement contained a standard "dragnet" clause stating that the security interest also was given to secure all future advances made by Kimbell Foods to O K Super Markets (*id.* at 3A).

By February 1969, when Republic made its federally guaranteed loan, O K Super Markets still owed Kimbell $24,893.10.[3] O K paid Kimbell using the Republic loan proceeds. In February 1969 O K also owed Kimbell $18,390.93 on open account for inventory purchases; it made payments equal to this amount, and Kimbell credited these against this balance (App. A, *infra*, pp. 3A–4A).

O K continued to make purchases on open account from Kimbell until January 15, 1971, when Kimbell filed suit in a Texas state court to recover an unpaid balance of $18,258.57 (App. A, *infra*, p. 4A). At approximately the same time, O K defaulted on its payments to Republic, which then assigned its security interest to the Small Business Administration. The agency paid the bank 90 percent of the indebtedness, which totaled $252,331.93 on that date, and filed the assignment with the proper state official (App. C, *infra*, pp. 34A–35A). Approximately a year after the

[2] The August 1966 security agreement and financing statement secured a $20,000 promissory note. The April and November 1968 security agreements and financing statements together secured a single $27,000 note (App. C, *infra*, pp. 33A–34A).

[3] O K had retired the 1966 note entirely, and the debt pertained only to the 1968 note. (App. A, *infra*, p. 3A).

assignment and filing, Kimbell obtained in a Texas state court a judgment for $24,445.37 on its claims against O K (*id.* at 33A, n. 2).

2. Kimbell filed the present suit in the United States District Court for the Northern District of Texas, seeking a declaration that its security interest in O K's property (and hence the state judgment) created a claim to O K's assets superior to that of the bank and the United States.[4] The district court held that the United States' security interest is superior (App. C, *infra,* pp. 36A–46A). It concluded that, under the governing federal law, a private lien is not entitled to priority over a federal lien unless the private lien has attached to the property, and all opportunities for contesting the amount of the lien have been exhausted, before the federal lien attaches (*id.* at 36A–42A). The court stated that because Kimbell Foods did not make its lien choate until February 1972, when the state court judgment was entered, it could not prevail over the United States' security interest, which had a priority date no later than January (*id.* at 43A).[5]

3. The court of appeals reversed. It held that the priority of the federal lien is governed by federal law,

[4] Jurisdiction was based on 28 U.S.C. 2410, relating to actions affecting property on which the United States has a lien (App. C, *infra*, p. 31A). Three of OK's stores had been sold, and Kimbell asserted a claim to the resulting funds. (*id.* at 32A–33A).

[5] The State of Texas and the City of Dallas intervened, claiming delinquent sales taxes and ad valorem taxes from the fund. The district court held that these claims did not have sufficient priority to be recognized (App. C, *infra*, pp. 46A–51A), and the intervenors did not appeal.

but it rejected the "choateness" rule followed by the district court for determining when a private lien is deemed to be perfected in competition with a federal lien. It rejected the "choateness" doctrine because it thought that the doctrine, which was developed in large part in connection with federal tax liens, should not be "extended" to situations in which the federal government is a surrogate commercial lender (App. A, *infra,* pp. 17A–19A). The court stated that the doctrine would cause potential credits of businesses that are eligible for Small Business Administration loans to shun these businesses, thereby harming the companies that the agency is supposed to assist (*id.* at 19A). It observed that Congress has altered the application of the choateness doctrine to tax liens, and argued that "logical symmetry" requires that the doctrine should not be applied to federal contractual liens (id. at 20A–22A).[6]

The court then fashioned a new federal rule for determining priorities. The court essentially adopted the Uniform Commercial Code, modified by the generally accepted federal rule that the lien "first in time is first in right" (App. A, *infra,* pp. 24A–26A).[7]

[6] The court of appeals also rejected the district court's alternate holding (App. C, *infra*, pp. 43A–46A) that Kimbell's lien could not have priority because it was not perfected under Texas law (App. A, *infra*, pp. 10A–13A). We do not present this question of state law for decision by this Court.

[7] The court of appeals subsequently decided to abandon the "first in time—first in right" rule. See *United States* v. *Crittenden*, 563 F. 2d 678 (C.A. 5). See also page 13, *infra.*

257-715—78——2

But on the question whether the future advances clauses in the security agreements between O K and Kimbell give Kimbell's 1970 and 1971 advances a priority dating back to the 1966 and 1968 agreements, the court considered a number of rules that had been applied by other courts (*id.* at 26*a*–28*a*). It narrowed its choice to two, but found it unnecessary to choose between the rules, because either one gives Kimbell a priority dating from before the earliest possible priority for the federal lien (*id.* at 28A).

REASONS FOR GRANTING THE PETITION

1. The Small Business Administration is in charge of a national program to make or guarantee loans that private lenders find too risky. A substantial number of the borrowers are unable to repay the loans on schedule. The Small Business Administration informs us that outstanding direct loans and guarantees amount to $8 billion, and that at most times approximately $1 billion is in default or in arrears.[8] Approximately 3,400 cases are in litigation at any time, and many involve questions of priorities between federal liens and competing liens. Many of the borrowers have operations in more than one state. It is plainly desirable that there be a uniform federal rule for de-

[8] During October 1977 there were 10,853 loans involving $551,800,000 in liquidation. An additional 27,628 loans, involving $493,600,000, were delinquent.

termining the priorities of competing liens in cases involving the federal government.[9]

Uniformity has proved to be an elusive goal. The courts of appeals are divided concerning the rules for establishing priority when federal and private liens compete. At least six courts of appeals have concluded that the federal lien takes precedence unless the competing lien attached to the property and became "choate" before the attachment of the federal lien.[10] Two courts of appeals, including the court in the present case, reject the "choateness" doctrine.[11] The two

[9] The Department of Housing and Urban Development, the Veterans Administration, the Farmers Home Administration, the Economic Development Administration, and [redacted] other federal agencies also make or guarantee loans. The rules of priority affect them no less than they affect the Small Business Administration.

[10] See *Willow Creek Lumber Co., Inc.* v. *Porter County Plumbing & Heating, Inc.*, C.A. 7, No. 77–1536, decided March 16, 1978; *Chicago Title Insurance Co.* v. *Sherred Village Associates*, 568 F. 2d 217 (C.A. 1); *United States* v. *General Douglas MacArthur Senior Village, Inc.*, 470 F. 2d 675 (C.A. 2), certiorari denied *sub nom. County of Nassau* v. *United States*, 412 U.S. 922; *T. H. Rogers Lumber Co.* v. *Apel*, 468 F. 2d 14 (C.A. 10); *United States* v. *Oswald and Hess Co.*, 345 F. 2d 886 (C.A. 3); *United States* v. *Latrobe Construction Co.*, 246 F. 2d 357 (C.A. 8), certiorari denied, 355 U.S. 890. The cases from the First, Second, Seventh and Tenth Circuits were decided after Congress amended the tax lien statutes in 1966.

[11] In addition to the present case, see *United States* v. *Crittenden, supra; United States* v. *California-Oregon Plywood, Inc.*, 527 F. 2d 687 (C.A. 9); *Connecticut Mutual Life Insurance Co.* v. *Carter*, 446 F. 2d 136 (C.A. 5), certiorari denied, 404 U.S. 857; *Ault* v. *United States*, 432 F. 2d 441 (C.A. 9), affirming *Ault* v. *Harris*, 317 F. Supp. 373 (D. Alaska).

most recent appellate decisions explicitly decline to follow the decision of the court of appeals in the instant case.[12] This Court should resolve the conflict and establish a uniform rule of priority.

2. The priority of a debt due the United States "is always a federal question." *United States* v. *Security Trust & Savings Bank,* 340 U.S. 47, 49; *United States* v. *Pioneer American Insurance Co.,* 374 U.S. 84, 88–89. No federal statute governs the priority of federal liens arising from the government's lending programs, and therefore "it is for the federal courts to fashion the governing rule of law according to their own standards." *Clearfield Trust Co.* v. *United States,* 318 U.S. 363, 367.

As a starting point, federal courts have followed the "cardinal rule" that the lien "first in time is first

[12] See *Willow Creek, supra; Chicago Title Insurance Co., supra,* 568 F. 2d at 222 (footnote omitted): "What dissuades us in particular from joining the Fifth and Ninth Circuits is that we would not merely be siding with one camp, making the split in the circuits a bit more even. We would, having decided not to rely on the traditional requirement of choateness in determining the cognizable timing of a mechanic's lien, have to adopt a substitute formula. We would have difficulty in following the Fifth Circuit in *Kimbell Foods, supra,* which applied local law, the Uniform Commercial Code, to a privately held secured interest. This device fitted the case admirably, since the U.C.C. is of general, nationwide application, with no quixotic parochial variations. Recourse to the local law governing mechanics' liens, however, would incorporate many local eccentricities. This fact led the Ninth Circuit in *Ault, supra,* to adopt * * * local law [only to a degree]. Application of this rule, though, would not only require [the federal agency] to concern itself with the varying state laws, but would require contractors to be aware of the possible applicability of two sets of rules. Were we to carve out our own approach which differed from the court in *Ault,* we would have succeeded only in further complicating a minefield * * *."

in right." *United States* v. *City of New Britain,* 347 U.S. 81, 85–86; *Rankin* v. *Scott,* 12 Wheat. 177, 179. To determine which lien is "first in time," most courts have adopted the doctrine—initially developed in tax and insolvency cases (see, *e.g., County of Spokane* v. *United States,* 279 U.S. 80, 94–95 (insolvency statute);[13] *United States* v. *City of New Britain, supra* (tax lien))—that the non-federal lien has priority from the date it becomes "choate." A lien becomes choate only when "the identity of the lienor, the property subject to the lien, and the amount of the lien" have been established. *United States* v. *City of New Britain, supra,* 347 U.S. at 84. The amount of the lien usually is not established until the lien is reduced to judgment. See *United States* v. *White Bear Brewing Co., Inc.,* 350 U.S. 1010, 1011 (Douglas, J., dissenting); *United States* v. *Acri,* 348 U.S. 211.

The court of appeals concluded, however, that the choateness rule should be abolished for a variety of "policy reasons" (App. A, *infra,* p. 17A). The court's reasons, we submit, do not bear scrutiny.

a. The court of appeals observed that the choateness doctrine had been devised in tax lien cases, and it stated that the government's position as an involuntary creditor in tax cases distinguishes tax liens from other federal liens (App. A, infra, pp. 17A–18A).[14] The court also argued that it is more impor-

[13] 31 U.S.C. 191 provides that in settling the affairs of any insolvent, "the debts due to the United States shall be first satisfied."

[14] The court overlooked the fact that the choateness doctrine was developed as an application of the insolvency statute, which applies to all situations in which the government is a creditor and the debtor is an "insolvent."

tant for the government to collect taxes than to recover bad debts. It is difficult, however, to find a material distinction between a dollar received from the collection of taxes and a dollar returned to the treasury on repayment of a federal loan.

And it is not appropriate to regard the Small Business Administration as an ordinary commercial lender. Government loans, guarantees, and insurance are provided for reasons of national policy, not to make a profit. The assistance usually is provided only if commercial credit is not available on reasonable terms. 15 U.S.C. 636(a)(1); see also, *e.g.*, 7 U.S.C. 1922(4), 1941(4) (Farmers Home Administration); 42 U.S.C. 3142(b)(4) (Economic Development Administration). The court of appeals was quite wrong in reasoning that the government should be treated as an ordinary commercial lender because it "enters the commercial credit scheme" with the same "opportunity to evaluate the credit risks" as a private lender (App. A, ~~supra~~ *infra*, p. 18A). The government enters only where private lenders do not go, and the choateness rule provides appropriate protection for loans where the government is the lender of last resort.

b. The court of appeals stated (App. A, *infra,* p. 19A) that the choateness doctrine harms small businesses, the intended beneficiaries of federal assistance, because it would lead private creditors to shun businesses that could be eligible for federal loans. But the Small Business Administration's operations in jurisdictions that follow the choateness doctrine afford an opportunity to test the court's assertion; that agency

informs us that it has not detected the hesitance that the court feared. Cf. *Small Business Administration* v. *McClellan,* 364 U.S. 446, 453. The federal guarantee often substantially improves the situation of the borrower, making commercial lenders more, not less, willing to lend additional sums. In the present case, for example, the federal guarantee allowed O K to retire outstanding indebtedness and provided needed operating funds for O K's troubled business, all to the benefit of O K's creditors, who continued to advance new sums.

Moreover, an alteration in the priority rules would not be an unmixed blessing for small businesses even if, as the court of appeals speculated, the present priority rules cause some commercial lenders to treat loans to small businesses as somewhat riskier. The Small Business Administration, like other federal lending or insuring agencies, has only limited resources. It uses a revolving fund as the basis for loans and guarantees (15 U.S.C. 633(c)). Inability of the Small Business Administration to realize on the security for its loans simply reduces the amount available for future loans—to the detriment of the small businesses.

c. The suggestion that, in light of the Federal Tax Lien Act of 1966, 80 Stat. 1125, amending 26 U.S.C. 6323, "logical symmetry urges rejection of * * * the choateness doctrine" (App. A, *infra,* pp. 20A–21A), rests on a misreading of the intent of Congress. The Tax Lien Act explicity affects only tax liens, and Congress did not alter the well-understood choateness rule for any other liens. Five courts of appeals and the

Court of Claims have rejected the argument that the Tax Lien Act has any bearing on the priorities of federal non-tax liens.[15] As the court explained in *United States* v. *General Douglas MacArthur Senior Village, Inc.*, 470 F. 2d 675, 678–679 (C.A. 2), certiorari denied *sub nom. County of Nassau* v. *United States*, 412 U.S. 922 (emphasis in orginal): "[w]e are unable to conclude * * * that a Congressional enactment, carefully drawn, which affects the priority of federal *tax* liens leaves the courts free to disregard prior precedents and thus to broadly extend the scope of the statute's principle to other unspecified areas which, though somewhat analogous, were simply not addressed by the Congress."[16]

[15] *Willow Creek Lumber Co., Inc.* v. *Porter County Plumbing & Heating, Inc., supra; Chicago Title Insurance Co.* v. *Sherred Village Associates, supra; United States* v. *General Douglas MacArthur Senior Village, Inc., supra; T. H. Rogers Lumber Co.* v. *Apel, supra; H. B. Agsten & Sons, Inc.* v. *Huntington Trust & Savings Bank*, 388 F. 2d 156 (C.A. 4) (*en banc*), certiorari denied, 390 U.S. 1025; *Aetna Insurance Co.* v. *United States*, 456 F. 2d 773 (Ct. Cl.). But see *United States* v. *California-Oregon Plywood, Inc., supra.*

[16] Furthermore, the [illegible] Lien Act creates only limited exceptions to the "first in time" and choateness rules. The Act does not abolish the choateness principle even for tax liens. See H.R. Rep. No. 1884, 89th Cong., 2d Sess. 35 (1966). For example, the Act does not protect mechanics' liens that arise before the lienors provide services or materials, even if these would be protected under state law against later arising liens. 26 U.S.C. 6323(h)(2); Plumb, *Federal Tax Liens* 152 (3d ed. 1972). And the Act gives priority to future advances pursuant to a written commercial financing agreement only if they are made within 45 days of the filing of the tax lien. 26 U.S.C. 6323(c). A court could achieve "logical symmetry" only by adopting the rules of the Tax Lien Act for use in all non-tax lien cases, not by abolishing the choateness doctrine. If the court had adopted the Tax Lien Act here, it probably could not have reached the result it did, because it appears that at least some of the advances by Kimbell were made more than 45 days after the federal lien attached and therefore would not have been accorded priority in tax cases.

3. Any attempt to develop new priority rules by litigation rather than by legislation is bound to produce considerable uncertainty. Once the choateness rule had been discarded, the present case raised two difficult issues—how a private lien is perfected, and whether future advances relate back to the original agreement. The court of appeals in resolving these questions here, and in deciding *United States* v. *Crittenden*, 563 F. 2d 678 (C.A. 5), considered the Uniform Commercial Code rule, state-modified versions of the U.C.C., state rules that pre-dated the U.C.C., the English rule, and the tax lien statute. The court narrowed the field in this case, but did not select a rule for future cases. *Crittenden* even rejected the "first in time" doctrine in order to recognize a "super-priority" for repairmen's liens; super-priority claims raise questions that defy logical analysis. As the First Circuit put the matter in *Chicago Title Insurance Co.* v. *Sherred Village Associates*, 568 F. 2d 217, in the course of rejecting the approach of the present case: "[w]e cannot avoid feeling that there is much that we do not know about the equities, effects of various rules, and relative ability of the federal and local lienors to protect themselves," and new rules "could be more equitably and intelligently made after Congressional hearings, rather than after a trial between a limited number of litigants". (568 F. 2d at 221 and n. 6).[17]

[17] See also note 12, *supra.*

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

WADE H. MCCREE, JR.,
Solicitor General.
BARBARA A. BABCOCK,
Assistant Attorney General.
MARION L. JETTON,
Assistant to the Solicitor General.
THOMAS G. WILSON,
Attorney.

MARCH 1978.

APPENDIX A

United States Court of Appeals Fifth Circuit

KIMBELL FOODS, INC., F/K/A KIMBELL MILLING COMPANY, D/B/A KIMBELL GROCERY COMPANY, PLAINTIFFS-APPELLANTS,

v.

REPUBLIC NATIONAL BANK OF DALLAS AND UNITED STATES OF AMERICA, DEFENDANTS-APPELLEES.

No. 75-4105

Aug. 12, 1977

Rehearing and Rehearing En Banc Denied Oct. 25, 1977

A. L. Vickers, Vernon O. Teofan, Holt W. Guysi, Dallas, Tex., for plaintiffs-appellants.

Frank J. Betancourt, Dallas, Tex., for Republic Nat'l Bank.

Michael P. Carnes, U.S. Atty., Fort Worth, Tex., Charles D. Cabaniss, Asst. U.S. Atty., Dallas, Tex., for defendants-appellees.

Appeal from the United States District Court for the Northern District of Texas.

Before THORNBERRY and GEE, Circuit Judges, and MARKEY,* Chief Judge.

GEE, Circuit Judge:

---

*Of the United States Court of Customs and Patent Appeals, sitting by designation.

On this appeal we must decide which creditor of a mercantile chain enjoys priority to repayment from the proceeds of the sale of assets of three supermarkets, aggregating $86,672. One of these is the Small Business Administration (hereinafter SBA), an avatar of the United States, serving as the guarantor of a private loan to the debtor. SBA claims the special priority enjoyed by the sovereign in collecting taxes and the debts owed it by insolvents. We conclude that the SBA lacks priority under either state or federal law.

The other parties are the debtor, O.K. Supermarkets, Inc. (hereinafter O.K.), and a private lender, Kimbell Foods, Inc. (hereinafter Kimbell). O.K. is a Dallas supermarket chain. The bulk sale of fixtures, equipment and inventory of three of its stores forms the fund to which the parties seek priority. O.K. owed Kimbell because of weekly inventory sales to O.K. on open account. Much of the factual background from which the claims of the parties emerged is undisputed.

O.K. executed three security agreements and financing statements to Kimbell. The first was in August 1966, securing a $20,000 promissory note from Kimbell. The collateral listed included supermarket equipment and fixtures and "[a]ll goods, wares and merchandise and any and all additions or accessions thereto." In April and November of 1968, O.K. executed the remaining security agreements and financing statements to secure a $27,000 promissory note from Kimbell. The collateral for these two agreements was again specifically identified equipment normally used in a supermarket and "[a]ll goods, wares, merchandise and stock in trade and accessions." Each of the security agreements was duly

filed, and no termination statement was filed on any of the agreements. It is of particular importance to this case that each of the security agreements included the provision that "said security interest also being given to secure the payment of all other indebtedness at any time hereafter owing by Debtor to Secured Party as well as the discharge of all obligations imposed upon Debtor hereunder."

On February 2, 1969, O.K. borrowed $300,000 from Republic National Bank of Dallas (hereinafter Republic). The SBA guaranteed 90% of this loan. On February 18, 1969, Republic filed with the Secretary of State of the State of Texas a security agreement and financing statement executed by O.K. to Republic granting it a security interest in all of the debtor's machinery, fixtures, equipment, inventory and all additions and accessions thereto.[1] When O.K. defaulted on this note the SBA paid Republic 90% of the outstanding indebtedness, some $252,313.93, and on January 21, 1971, Republic assigned the SBA 90% of the note and financing statement.

Events subsequent to the 1969 loan of $300,000 form perhaps the most important part of this tableau. When Republic made its loan, O.K. owed Kimbell $24,893.10 on the 1968 note for $27,000. O.K. paid off this note from the Republic loan proceeds. Thus, both the 1966 note[2] and the 1968 note between O.K. and Kimbell

---

[1] Republic had previously filed a financing statement on August 7, 1968, covering the same collateral but refiled the statement on February 18, 1969. The district court apparently considered only the February 18 filing effective, see 401 F. Supp. at 323, as do we.

[2] The record is unclear on the disposition of the 1966 note. We may assume that it was satisfied because the parties stipulated that on February 12, 1969, the 1968 note was the only outstanding promisory note between O.K. and Kimbell.

had been satisfied. O.K. still, however, owed Kimbell $18,390.93 on open account for inventory purchases. After February 12, 1969, O.K. paid Kimbell $18,390.93 against that debt—payments Kimbell credited to O.K.'s oldest outstanding balances. O.K. kept on making inventory purchases from Kimbell on open account until January 15, 1971. By then the balance of O.K.'s account with Kimbell was $18,258.57. On January 15, 1971, Kimbell filed suit in Texas courts to recover that amount and, on January 31, 1972, obtained a judgment for $24,445.37—$18,258.57 principal, $1,186.80 interest and $5,000 attorney's fees.

Both the SBA and Kimbell claimed priority in the $86,672 proceeds of the sale of three O.K. Supermarkets. After hearing the evidence and considering the stipulations of the parties the court ruled that the SBA had priority superior to all inchoate liens by virtue of its special status as a federal lien creditor. The district court ruled Kimbell's lien inchoate because Kimbell had not reduced its lien to judgment before the SBA guaranteed Republic's note or before the SBA made good on its guarantee. The court went on to rule that Kimbell did not have a good security interest in the goods sold at bulk sale, a fact that certainly rendered its lien inchoate. Kimbell appeals.

Kimbell's Lien

We must first determine whether the district court properly held that Kimbell's security agreements securing the 1966 and 1968 notes did not cover the advances Kimbel made to O.K. on open account.[3] The

[3] Kimbell contends this question is not before the court because of stipulations in the pretrial order of the parties, who stipulated the existence of the 1966 and 1968 loans, security agreements and financing statements. Nowhere in the stipulations did the parties agree that the security agreements secured Kimbell's advances to O.K. of inventory on open account. Nor was the question explicitly listed as one of the contested issues of law in the pretrial order. The question was raised implicitly, however, in contested issues of fact and law concerning the understanding of Republic as to the priority of its lien, the effect of O.K.'s payoff of the 1968 note, and the effect of O.K.'s payments to Kimbell of amounts greater than the balance on open account outstanding just prior to Republic's 1969 loan to Kimbell. We think the question was before the court.

security agreements provide that the security interest also secures the payment of future indebtedness between the parties. Texas law countenances such so-called "dragnet clauses." *See* Tex. Bus. & Com. Code § 9.204(e) (Tex. U.C.C.).[4] Acknowledging this apparent approval of future advance clauses, the district court ruled that the future advance clause did not operate in this case. It relied on pre-Code Texas cases and U.C.C. cases from other jurisdictions to restrict the application of the future advance clause to future debts clearly contemplated by the parties. So reasoning, it ruled that in this case the parties meant the security agreements to cover only the notes for which

[4] Obligations covered by a security agreement may include future advances or other value whether or not the advances or value are given pursuant to commitment. * * * Tex.Bus. & Com. Code § 9.204(e) (1968) (Tex.U.C.C.). The Texas Business and Commerce Code, containing Texas' version of the U.C.C., was amended in 1973. The amendments changed portions of the U.C.C. relevant to this case, but those changes did not become effective until January 1, 1974. Unless otherwise noted, we rely on the Texas U.C.C. as it existed at the time of the relevant events in this case.

they were executed, not later purchases on open account. We view the transactions differently.[5]

Although the district court correctly stated the law of Texas, it arrived at the wrong conclusion in light of Texas' application of its law. Texas courts do not recognize the application of a future advance clause unless the future advance to be secured was "reasonably within the contemplation of the parties to the mortgage at the time it was made." *Wood* v. *Parker Square State Bank,* 400 S.W. 2d 898, 901 (Tex. 1966). *See also Moss* v. *Hipp,* 387 S.W. 2d 656 (Tex. 1965); Wallenstein & St. Claire, *Annual Survey of Texas Law—Property,* 30 Southwestern L.J. 28, 53 n. 214 (1976).[6] Consistent with this view, in Texas a future advance clause in a mortgage does not secure a subsequent debt from the debtor to a third party acquired from the third party by the mortgagee. *See Wood, supra.* In circumstances similar to those at bar, however, Texas courts have hinted that future advance clauses will be effective. In *Wood,* for example, the Texas Supreme Court remarked that:

> The more reasonable construction of this general language [a future advance clause] is that it referred to obligations directly arising between Lincoln Enterprises [the original debtor] and respondent bank [the original lender], i.e., where Lincoln became obligated to the bank as the maker of an obligation, or became liable in a secondary capacity in favor of the bank.

[5] The interpretation of a contract is a question of law, so we are not restricted by the clearly erroneous rule of Fed. R. Civ. P. 52(a). *See Backar* v. *Western States Producing Co.,* 547 F. 2d 876, 880 (5th Cir. 1977); *First Nat'l Bank* v. *Ins. Co. of North America,* 495 F. 2d 519, 522 (5th Cir. 1974).

[6] In the absence of Texas cases dealing with future advance clauses under the Code, we, like the district court, have drawn upon Texas' treatment of future advance clauses in other instruments. Because the Texas U.C.C. gives no indication that future advance clauses are to be treated differently today than under Texas pre-Code law, we consider the pre-Code cases dealing with other types of security interests authoritative.

Supra at 902. *See also Estes* v. *Republic National Bank,* 462 S.W. 2d 273 (Tex. 1970); Wallenstein & St. Claire, *supra* at 53 n. 214. In light of this evidence we conclude that in Texas a further extension of credit to the debtor by the lender is deemed future indebtedness reasonably contemplated by the parties when they execute a future advance clause.

The district court concluded that the parties did not intend the future advance clause to cover purchases on open account because the security agreements were intended to cover only the amounts loaned under a promissory note. In reaching this conclusion, however, the district court ignored two important factors: the parol evidence rule and Texas' treatment of future advance clauses in analogous situations. The district court admitted testimony by Harold Kindle, the president of O.K., about the subjective intention of the parties when they executed the 1966 and 1968 notes, security agreements and financing statements. Although his testimony was equivocal,[7]

[7] Indeed, well-nigh incoherent. When asked whether O.K. intended that the security agreements cover all other advances and open accounts between it and Kimbell, Kindle answered: "Well, I considered the 1966 agreement a thing of the past from the 1968 agreement. I felt like it was, you know, a new beginning and since we intended to pay the full amount—I realize it was a demand note and they could demand it at any time they wanted to, but we had had a good relationship so it was of no real concern. I didn't stop and ponder about, well, should I do this or should we do this.—O.K. Supermarkets."

When asked again, Kindle responded: "There again, there was not any specific instruction—on this question I mean—about

the district court understood him to say that the parties intended each transaction to be separate and distinct. Admisssion of such testimony was error. The language of the contract, unless ambiguous, represents the intention of the parties. The intent deduced from this objective matter, not the parties' subjective understandings, is controlling. *See Western Oil Fields, Inc.* v. *Pennzoil United, Inc.*, 421 F. 2d 387, 390 (5th Cir. 1970); *City of Pinehurst* v. *Spooner Addition Water Co.*, 432 S.W. 2d 515, 518 (Tex. 1968); *Wall* v. *Lower Colorado River Authority*, 536 S.W. 2d 688, 691 (Tex. Civ. App.—Austin 1976, writ ref'd n.r.e.). *See also First National Bank* v. *Rozelle*, 493 F. 2d 1196, 1201 (10th Cir. 1974). Testimony as to O.K.'s subjective intent in receiving the future advance clause was a classic violation of the parole evidence rule and clearly inadmissible.

The district court compounded this error by failing to consider the truest test of the parties' intention, the words of the contract clearly providing that the security agreement should cover future indebtedness. In *Estes* v. *Republic National Bank*, 462 S.W. 2d 273 (Tex. 1970), the Texas Supreme Court upheld the applicability of a future advance clause despite the debtor's claim of an oral agreement that the deed of trust containing the future advance clause was intended as a separate transaction not to extend to other

---

which agreement would cover which. I felt like we signed a new statement in '68, and everything that had transpired in the past was history. I felt like that any monies expended on either one of those without an abrupt halt and then a start over again would be—that '66 would be history now and then when the '68 was paid off, it would be history as well."

indebtedness between the parties. In the absence of some evidence that the "dragnet clause" was placed in the contract by mutual mistake, the court found that the clause clearly and unequivocally stated the intention of the parties for the land to secure the debtor's other loans from the bank. *See also Wood, supra.* In light of the *Estes* and *Wood* cases, the district court improperly discarded these future advance clauses.

The district court also relied on the circumstances surrounding the 1966 and 1968 loans in finding that the parties treated each loan as a separate and distinct agreement for a specific, nonrecurring purpose and to determine that the later inventory purchases were unrelated. Examining the documents and the circumstances surrounding their execution, we find nothing that negates the parties' statement that the security agreements cover the inventory purchases on account.

The 1966 promissory note was entered into to free O.K.'s current cash flow to purchase fixtures for a new store and to allow O.K. to buy opening inventory from Kimbell on credit. At least in part, then, the 1966 security agreement contemplated the purchase of inventory on credit. The security agreement states that it is given "to secure an advance of goods, wares and merchandise and does not include a pree..isting debt." Under these circumstances we cannot say that later inventory purchases on credit by O.K. were "unrelated" to the 1966 security agreement or involved future advances "not of the same class" so as to negate the applicability of the future advance clause, as the district court held. *See* 401 F. Supp. at 325–26.

Again in 1968, O.K.'s promissory note allowed it to delay payment on its open-account purchases so as

to free current cash flow to pay off a debt owed Associated Grocers, Inc. The 1968 security agreement and financing statements were again related to Kimbell's inventory advances on open account to O.K.[8] Although the notes, security agreements and financing statements were executed in response to special factual circumstances, those circumstances are not necessarily inconsistent with giving the future advance clauses in those agreements their plain meaning, *see First National Bank* v. *Rozelle, supra* at 1201, holding that Kimbell's 1966 and 1968 security agreements and financing statements covered its later advances of inventory to O.K. on open account.

Priority Under State Law

We now consider whether Kimbell had priority under state law. If it did not, we need not consider the more pressing questions of the applicability of federal law and the relative priority of federal liens. *See United States* v. *P. S. Hotel Corp.*, 527 F. 2d 500, 501 (8th Cir. 1975). As the assignee of Republic's 1969 note and security agreement, the SBA may assert whatever priority that note might command under state law. The district court did not directly address the question of Republic's priority *qua* noteholder because of its view that Kimbell's security agreements with O.K. did not secure future advances. We find that they did, but even so the security agreement of February 18, 1969, between Republic and O.K. might be thought prior for two reasons. First, Republic may have established a security interest superior to that of Kimbell. Second, the 1969 note might be thought prior to secured future advances made after February 18, 1969. After reviewing the Texas law, we conclude that neither of these theories accords the SBA, standing in the shoes of Republic, priority in the proceeds from the bulk sale.

[8] O.K.'s failure to demand a termination statement under Tex. Bus. & Com.Code § 9.404(a) (1968) (Tex.U.C.C.) after paying off the 1968 note also tends to discredit the claim that the security agreements applied only to the 1966 and 1968 notes.

Republic could obtain a superior security interest in the collateral, notwithstanding Kimbell's previously filed security agreement, if Republic attained a purchase money security interest in the collateral. The Uniform Commercial Code, adopted in Texas, provides that a purchase-money security interest in collateral except inventory has priority over a conflicting security interest in the same collateral if the purchase money security interest is properly perfected. Tex. Bus. & Com. Code § 9.314(d) (1968) (Tex. U.C.C.). Unfortunately for Republic and the SBA, the record reflects no purchase of goods by O.K. with the proceeds of the $300,000 note that could give rise to a purchase-money security interest in any items sold at the bulk sale—except inventory.

O.K. used some of the funds from the $300,000 note to purchase inventory. Texas law affords Republic a purchase-money security interest in that inventory and grants Republic priority: *if* the security interest was perfected at the time the debtor received possession; *if* the holder of the purchase-money security interest notified the holders of prior security interests before the debtor received possession of the collateral; and *if* that notice stated that the person giving notice had or expected to acquire a purchase-money security interest in the specifically described goods. Tex. Bus. & Com. Code § 9.312(c) (1968) (Tex. U.C.C.). Republic did not give the required notice to Kimbell so

as to establish priority in the inventory. *See Borg Warner Acceptance Corp.* v. *Wolfe City National Bank,* 544 S.W. 2d 947, 951 (Tex. Civ. App.—Dallas 1976, no writ). Kimbell was vaguely aware that Republic was planning to loan O.K. funds and would expect to acquire a lien, but Republic never gave Kimbell the notification requisite for priority under the Code. Republic never notified Kimbell that it expected to acquire a lien on the inventory, nor did it describe the inventory by item or type. Republic thus forfeited whatever priority it could have attained. Republic had priority, therefore, only if its lien was prior in time to Kimbell's.

Here we again inquire into the nature of the future advance clause and the security interest it creates, a particularly important endeavor when, as here, the inquiry determines the status of the lien of an intervening secured creditor. The Texas U.C.C. provides in § 9.312(e)(1) that the first filed of conflicting security interests perfected by filing prevails. Tex.Bus. & Com.Code § 9.312(e)(1) (1968) (Tex.U.C.C.). In this case both Kimbell's and Republic's security interests were perfected by filing; Kimbell would normally have priority unless the future advance did not qualify because of the creation of an intervening security interest. The circumstance of a future advance after an intervening filed security interest does not alter the scheme, however. When both the interests are filed security interests, we interpret section 9.312 (e) of the U.C.C. to adopt the relation-back position so that the first-to-file rule awards priority even to an advance made after an intervening security interest. *See* Tex. Bus. & Com. Code § 9.312(e)(1) and Example 4 (1968) (Tex. U.C.C.); Cohen, *The Future Advance Interest Under the Uniform Commercial*

Code: Validity and Priority, 10 B.C. Ind. & Com. L. Rev. 1, 13 (1968); Comment, *Priority of Future Advances Lending Under the Uniform Commercial Code,* 35 U. Chi. L. Rev. 128, 133–34 (1967). The 1972 amendments to the U.C.C., adopted by Texas in 1973, effective in 1974, explicitly adopted the relation-back position for future advances. *See* Tex. Bus. & Com. Code § 9.312(g) (Supp.1976) (Tex.U.C.C.). Although no Texas cases confirmed the prior U.C.C. provisions' adoption of the relation-back doctrine, the doctrine was consistently upheld in pre-Code Texas cases involving future advances. *See Freiberg v. Magale,* 70 Tex. 116, 7 S.W. 684, 685 (1888); *Crabb v. William Cameron & Co.,* 63 S.W.2d 367, 368 (Tex. Com.App.1933, judgm't adopted); *Coke Lumber & Mfg. Co. v. First National Bank,* 529 S.W. 2d 612, 615 (Tex. Civ.App.—Dallas 1975, writ ref'd). *See also* Wallenstein & St. Claire, *supra* at 53–54 n. 214. Under Texas law, Kimbell retained a superior lien to Republic, and the SBA, as Republic's assignee, held an inferior state lien.

Priority Under Federal Law

The SBA asserts that, despite its poor showing under state law, under federal law it has a claim superior to Kimbell's.[9] The SBA asserts the federal

[9] We have recently ruled that federal law controls the rights and duties of the United States when it operates the SBA loan program. *United States* v. *Terrey,* 554 F. 2d 685 (5th Cir. 1977). *See Miree* v. *DeKalb County,* —— U.S. ——, 97 S. Ct. 2490, 53 L. Ed. 2d 557 (1977); *Clearfield Trust Co.* v. *United States,* 318 U.S. 363, 63 S. Ct. 573, 87 L. Ed. 838 (1943). One matter in the record suggests that this principle may not apply. The February 18, 1969, security agreement between Republic and O.K. provided

common law priority rule of "first in time, first in right" and the peculiar patina that federal courts have placed on that rule specifying that only "choate" nonfederal liens may qualify as "first in time." We conclude that the "choateness" rule of federal common law does not apply here.

Understanding the SBA's argument requires a review of the development of the federal common law of priority. The source of much of federal priority law is the congressional declaration awarding the United States priority for the payment of its debts from certain insolvents.[10] In 31 U.S.C. § 191 (1970) (or Revised

---

that "This agreement shall be construed according to the laws of the State of Texas." The agreement bound the parties' assigns to this provision; thus, the SBA was bound to the application of Texas law in its pursuit of its rights against O.K. *See United States* v. *Whitehouse Plastics*, 501 F. 2d 692, 694 n. 1 (5th Cir. 1974). *Cf. United States* v. *Terrey*, 554 F. 2d 685 (5th Cir. 1977). *But see United States* v. *Outriggers, Inc.*, 549 F. 2d 337, 340 n. 5 (5th Cir. 1977) (SBA regulation requires application of federal law to SBA documents). Nevertheless, we cannot read the language in the security agreement as waiving the SBA's right to have federal law applied in evaluating the priority of its interest against those of third parties.

[10] Whenever any person indebted to the United States is insolvent, or whenever the estate of any deceased debtor, in the hands of the executors or administrators, is insufficient to pay all the debts due from the deceased, the debts due to the United States shall be first satisfied; and the priority established shall extend as well to cases in which a debtor, not having sufficient property to pay all his debts, makes a voluntary assignment thereof, or in which the estate and effects of an absconding, concealed, or absent debtor are attached by process of law, as to cases in which an act of bankruptcy is committed.
31 U.S.C. § 191 (1970). Although our present concept of governmental priority developed as an intrinsic privilege of the English crown, the United States' priority derives solely from statute. *See*

Statutes § 3466 as it is more commonly known), Congress requires that in settling the affairs of certain insolvents "the debts due to the United States shall be first satisfied." Section 3466 had been read as only granting the United States, as an unsecured creditor, a priority against other unsecured creditors, *see* Kennedy, *The Relative Priority of the Federal Government: The Pernicious Career of the Inchoate and General Lien*, 63 Yale L. J. 905, 909–11 (1954), thus recognizing the integrity of pre-exisiting liens. But in *Spokane County* v. *United States*, 279 U.S. 80, 49 S. Ct. 321, 73 L. Ed. 621 (1929), the Supreme Court concluded that the priority granted the United States would defer only to specific and perfected ("choate") liens prior in time. 279 U.S. at 93–95, 49 S. Ct. 321. To further protect the United States' priority under section 3466, the Supreme Court ruled that whether a lien was choate involved a matter of federal law, *see United States* v. *Waddill, Holland & Flinn, Inc.*, 323 U.S. 353, 65 S. Ct. 304, 89 L. Ed. 294 (1945), thus preventing states from divesting the United States of priority by adopting their own definitions of what constituted a choate state lien. Later the Supreme Court narrowly defined what could qualify as a choate lien,[11] effectively assuring absolute priority to United States claims under section 3466. *See* Plumb, *Federal Liens and Priorities—Agenda for the Next Decade*, 77 Yale

---

United States v. *Vermont*, 377 U.S. 351, 358, 84 S. Ct. 1267, 12 L. Ed. 2d 370 (1965); *United States* v. *New Britain*, 347 U.S. 81, 84, 74 S. Ct. 367, 98 L. Ed. 520 (1954).

[11] To assure that his lien was choate, the private lien holder must establish the identity of the lienor, the property subject to the lien, and the fixed amount of the lien. *See, e.g., United States* v. *New Britain*, 347 U.S. 81, 74 S. Ct. 367, 98 L. Ed. 520 (1954);

257-715—78——5

L. J. 228, 230 (1967); Kennedy, *From Spokane County to Vermont: The Campaign of the Federal Government Against the Inchoate Lien,* 50 Iowa L. Rev. 724, 736 (1965); Burroughs, *The Choate Lien Doctrine,* 1963 Duke L. J. 449, 452. *See generally,* Lacy, *Effect of Federal Priority and Tax Lien Legislation on Creditors of Vendors and Purchasers,* 50 Ore. L. Rev. 621, 625–31 (1971). Our case does not require the application of section 3466, since O.K. is not an insolvent, but the SBA invokes the choateness doctrine spawned by section 3466 to claim priority.

The SBA bases its argument on judicial extension of the choateness doctrine to determine priority for other federal liens. Although the federal tax statute accorded the United States a lien for taxes only—making no mention of priority for federal tax liens, *see* 26 U.S.C. § 6321 (1970)—in *United States v. Security Trust & Savings Bank,* 340 U.S. 47, 71 S. Ct. 111, 95 L. Ed. 53 (1950), the Supreme Court held that the choateness principles of section 3466 were equally applicable when a federal tax lien was competing for priority with a state lien. The purpose of the tax lien statute was to assure prompt and certain collection of taxes from tax delinquents; this purpose required a rule similar to that prevailing with collections under section 3466, 340 U.S. at 51, 71 S. Ct. 111. Other federal courts, without questioning

United States v. *Pioneer American Ins. Co.*, 374 U.S. 84, 83 S. Ct. 1651, 10 L. Ed. 2d 770 (1963). Because the amount of the lien was not fixed until the lienor had exhausted his opportunities to challenge the amount, the Court indicated that only possession or reduction to judgment would meet the last criterion. *See, e.g., United States* v. *Gilbert Associates, Inc.*, 345 U.S. 361, 73 S. Ct. 701, 97 L. Ed. 1071 (1953). *See also Texas Oil & Gas Corp.* v. *United States*, 466 F. 2d 1040, 1044–45 (5th Cir. 1972).

whether the reasons for extending the choateness doctrine of section 3466 to tax liens justified its extension to other liens, have applied the doctrine to bestow overriding priority on other federal liens. ***See, e. g.,*** *T. H. Rogers Lumber Co v. Apel,* 468 F. 2d 14 (10th Cir. 1972) (FHA mortgage lien); *United States v. Oswald & Hess Co.,* 345 F. 2d 886 (3d Cir. 1965) (SBA mortgage lien); *In re Lehigh Valley Mills, Inc.,* 341 F. 2d 398 (3d Cir. 1965) (SBA security interest). *See also,* Plumb, *Federal Liens & Priorities—Agenda for the Next Decade,* 77 Yale L. J. 228, 286–87 (1967). The SBA asks us to accord it this superior status in this ordinary commerical transaction far removed from the doctrine's origins by arguing that the choateness doctrine is an inevitable consequence of applying federal law; but as our study reveals, the choateness concept is a judicial creation distinguishable from the well-recognized federal rule of "first in time, first in right." *See Texas Oil & Gas Corp. v. United States,* 466 F. 2d 1040, 1045 (5th Cir. 1972); Plumb, *supra* at 230. History in this area does not permit us to enshrine without analysis the status sought by the SBA. Viewing the choateness doctrine independently, strong policy reasons militate against its application in this context.

First, the interests supporting the Supreme Court's extension of section 3466's criteria to tax liens in *Security Trust* do not support a similar extension to liens arising from SBA garden-variety commercial loans or guaranties. The choateness doctrine reflects a judicial recognition of the self-preservation prerogative of the sovereign. Taxes are its lifeblood, and the choateness doctrine recognizes and protects that vital flow. Delinquent taxes make the United States an involuntary creditor of the taxpayer, often ranged

against other substantial commercial creditors and state tax creditors. By the time the United States becomes aware of its status and files its tax lien, it may well—absent self-help—find itself standing at the end of the state priority line. The Supreme Court's extension of the choateness doctrine protected the collection of taxes and gave the United States, a sovereign, a measure of relief from its involuntary-creditor status. When the United States, however, in its less-exalted capacity as SBA, serves as a surrogate commercial lender or guarantor, it enters the commercial credit scheme voluntarily. These circumstances afford it an opportunity to evaluate the credit risks, to examine the interests of other creditors, and to exact such security as the circumstances and policy of the program dictate. *See* Plumb, *The Relative Priority of Federal and Business Claims: Yesterday, Today and Tomorrow*, 27 Bus. Lawyer 1195, 1217 (1972); Comment, *The Priority of Federal Claims: Selected Problems and Theoretical Considerations*, 24 Case W. L. Rev. 521, 534–35 (1973); Comment, *The Relative Priority of SBA Liens: An Unreasonable Extension of the Federal Preference*, 64 Mich. L. Rev. 1107, 1128–29 (1966). As a quasi-commercial lender, SBA (U.S.A.) does not require, and should not be accorded, the special priority which it compels as sovereign, so long as it complies with Congress' admonition that it make loans which are "of such sound value or so secured as reasonably to assure repayment." 15 U.S.C. § 636(a)(7) (1970). *See* Comment, *The Relative Priority of SBA Liens: An Unreasonable Extension of the Federal Preference, supra* at 1119.

Second, in a related concern, the importance of taxes to the functioning of government mer-

its the extraordinary priority accorded them by the judge-made "choateness" doctrine. The Supreme Court has long recognized that section 3466 is informed by the importance of securing adequate revenue to sustain the public burdens and discharge the public debts. *See United States* v. *Moore*, 423 U.S. 77, 81–82, 96 S. Ct. 310, 46 L. Ed. 2d 219 (1975); *United States v. Emory*, 314 U.S. 423, 426, 62 S. Ct. 317, 86 L. Ed. 315 (1943); *United States* v. *State Bank of North Carolina*, 6 Pet. 29, 35, 8 L. Ed. 308, 310 (1832). Consequently it has transferred that respect for revenue-protecting measures to the tax-lien statute. *See Security Trust, supra.* On the other hand, the SBA program is a supplement to commercial loan operations, certainly less central to the proper functioning of the national government and less deserving of the extraordinary priority accorded by the choateness doctrine.

Third, granting the SBA an exceptional priority pursuant to the choateness doctrine is inconsistent with the congressional declaration of policy pursuant to its establishment of the SBA. In 15 U.S.C. § 631 (1970), Congress declares that the purpose of the SBA assistance program is "to assist in the establishment, preservation, and strengthening of small business concerns * * *." If the SBA may belatedly buy into loans and so assert liens superior to those of prior secured creditors, every sane potential creditor of small business will shun potential debtors of the SBA as anathema or extract promises that the debtor will not seek SBA assistance. What secured creditor will extend credit on collateral that may only serve to increase the security of a future SBA loan? Such a legal posture scarcely assures a steady flow of capital into necessitous small business.

Finally, logical symmetry urges rejection of the SBA's effort to extend the choateness doctrine to this context. The primary thrust of the SBA's argument is that because section 3466's choateness doctrine was extended to tax liens it should be extended to SBA contractual liens. Yet in the Federal Tax Lien Act of 1966 Congress substantially pared the applicability of the choateness doctrine by recognizing that certain state lien interests, including security interests, could attain priority over tax liens. *See* 26 U.S.C. § 6323 (1970). *See generally,* Coogan, *The Effect of the Federal Tax Lien Act of 1966 Upon Security Interests Created Under the Uniform Commercial Code,* 81 Harv. L. Rev. 1369 (1968). Why should the choateness doctrine bestow priority on an SBA contractual lien when a United States tax lien, more in need of the protection of the choateness doctrine, commands no such priority? *Connecticut Mutual Life Ins. Co.* v. *Carter,* 446 F. 2d 136, 139 (5th Cir.), *cert. denied,* 404 U.S. 857, 92 S.Ct. 104, 30 L. Ed. 2d 98 (1971); *Ault* v. *Harris,* 317 F. Supp. 373, 375 (D. Alaska), *aff'd and opinion adopted,* 432 F. 2d 441 (9th Cir. 1970). *See* Note, 3 Rutgers Camden L. Rev. 592, 597 (1972).[12] In the absence of any congressional directive to extend the choateness doctrine[13] and in our role as judicial custodians of the doctrine, we decline to extend it further in this Circuit.

[12] The district court distinguished *Connecticut Mutual's* analogy to the 1966 Tax Lien Act by relying on cases in other circuits and a subsequent case in our circuit reaffirming the existence of the choateness doctrine. 401 F. Supp. at 323–24. In *Texas Oil & Gas Corp.* v. *United States,* 466 F. 2d 1040 (5th Cir. 1972), we utilized the choateness doctrine to adjudge whether a state lien fitted the priority provisions of the 1966 Tax Lien Act. This action is not inconsistent with our refusal to extend the choateness doctrine to SBA security interests because previous case law had established the applicability of the choateness doctrine to statutorily-created federal tax liens. The 1966 Tax Lien Act adjusted the application of the doctrine by recognizing the priority of certain state interests, essentially granting exceptions to the choateness doctrine. In this area of SBA contractual liens, the choateness doctrine has not been established as a concomitant to the application of the federal "first in time, first in right" rule. We consider the 1966 Tax Lien Act as neither affirming nor denying the applicability of the choateness doctrine to other federal liens, but the Act's recognition that some state claims should have priority over federal tax liens is a strong policy argument against extending the choateness doctrine to deny priority to state claims. Accordingly, the decisions of other circuit courts that deny that the 1966 Tax Lien Act was intended to subordinate other federal liens are consistent with our approach. *See T. H. Rogers Lumber Co.* v. *Apel,* 468 F. 2d 14 (10th Cir. 1972); *United States* v. *General Douglas MacArthur Senior Village, Inc.,* 470 F. 2d 675 (2d Cir. 1972). We differ with those courts because, unlike them, we do not consider the choateness doctrine a necessary companion to the federal "first in time, first in right" priority scheme.

[13] In 15 U.S.C. § 646 (1970), Congress subordinates SBA interests in property to state property taxes: "Any interest held by the Administration in property, as security for a loan, shall be subordinate to any lien on such property for taxes due on the property to a state, a political subdivision thereof, in any case when such lien would, under applicable state law, be superior to such interest if such interest were held by any party other than the United States."

This statute could be read as ameliorating the impact of the choateness doctrine by waiving the immunity it would grant, thus implicitly recognizing the applicability of the choateness doctrine to SBA liens. We have read the enactment less broadly, noting that the purpose of § 646 is to waive the extraordinary priority of § 3466, 31 U.S.C. § 191 (1970). *See City of Sherman* v. *United States,* 400 F. 2d 373, 377 (5th Cir. 1968). By giving SBA liens the same status as state liens with regard to state tax claims, the provision also has the effect of waiving the "first in time, first in right" principle to recognize the state's grant of priority to later liens for state and local taxes. *See Edmondson* v. *Chesapeke*

(Continued)

The SBA argues that circuit courts have already concluded that the choateness doctrine applies to mortgage liens, so it should apply here in the virtually identical situation of a federal contractual lien competing against state liens. It is true that a number of courts, including ours, have concluded that the federal "first in time, first in right" approach to priority applies to federal mortgage liens. *See United States v. Roessling,* 280 F. 2d 933 (5th Cir. 1960) (mortgage lien under Emergency Relief Appropriation Act of 1935); *United States v. General Douglas MacArthur Senior Village,* 470 F. 2d 675 (2d Cir. 1972) (HUD mortgage lien); *Director of Revenue v. United States,* 392 F. 2d 307 (10th Cir. 1968) (SBA mortgage lien); *United States v. County of Iowa,* 295 F. 2d 257 (7th Cir. 1961) (Reconstruction Finance Corp. mortgage lien); *Southwest Engine Co. v. United States,* 275 F. 2d 106) (10th Cir. 1960) (SBA chattel mortgage lien). Those cases are not necessarily authority for adoption of the choateness doctrine here, however, for in each case the application of the "first in time, first in right" doctrine, *without using the concept of choateness,* could have given priority to the federal liens because each competing state lien arose after the federal lien. *See Roessling, supra* at 935; *General Douglas MacArthur Senior Village, supra* at 677; *Director of Revenue, supra* at 313; *County of Iowa, supra* at 257–58; *Southwest Engine Co., supra* at 107. *See also,* Plumb, *Federal Tax*

Clamchip Corp., 350 F. Supp. 1236, 1239 (D. Md. 1972). In light of these purposes we detect no implicit congressional recognition of and reaction to the general application of the choateness doctrine.

Liens & Priorities—Agenda for the Next Decade, 77 Yale L. J. 228, 287 n. 368 (1967); Comment, *The Relative Priority of SBA Liens: An Unreasonable Extension of the Federal Preference,* 64 Mich. L. Rev. 1107, 1128 (1966). Only the Third Circuit has applied the choateness doctrine to give priority to federal contractual liens when an unvarnished "first in time, first in right" approach would have given priority to the state claims. *See United States v. Oswald & Hess Co.,* 345 F. 2d 886 (3d Cir. 1965) (SBA mortgage lien); *In re Lehigh Valley Mills, Inc.,* 341 F. 2d 398 (3d Cir. 1965) (SBA mortgage lien). But there the Third Circuit assumed without analysis that "choateness" was part and parcel of the federal law. Our examination of the history of the choateness doctrine and the policy arguments against its extension to circumstances when the United States acts as lender persuade us to reject the Third Circuit's approach and hold that the choateness doctrine does not apply to give priority to the SBA's contractual lien in the absence of insolvency.[14]

[14] Even if we did apply the choateness doctrine to this claim, it is not certain that the SBA's lien would prevail. To be choate, the identity of the lienor, the property subject to the lien, and the amount of the lien must be established. *See* note 10, *supra.* For state liens competing with federal tax liens or liens with § 3466 priority, the last requirement meant that the lienor must have either obtained a judgment or the lien must have been enforceable by summary proceeding. *See United States* v. *Acri,* 348 U.S. 211, 214, 75 S. Ct. 239, 99 L. Ed. 264 (1955); *United States* v. *Liverpool & London & Globe Ins. Co.,* 348 U.S. 215, 217, 75 S. Ct. 244, 99 L. Ed. 268 (1955). Under these criteria, federal liens with § 3466 priority are virtually invulnerable to state claims. Kennedy, *From Spokane County to Vermont: The Campaign of the Federal Government Against the Inchoate Lien,* 50 Iowa L. Rev. 724, 736 (1965). The Supreme Court intimated

Despite our decision that the choateness doctrine alone does not give the SBA priority, the question the choateness doctrine addresses still remains: how does a federal court determine when a state lien has arisen so that it may decide whether the state or the federal lien is "first in time?" Whatever the answer to that question may be in other contexts,[15] in the con-

prior to the 1966 Tax Lien Act, however, that the choateness criteria might be more easily satisfied by state liens competing against federal tax liens because Congress had not provided priority for tax liens. *See United States* v. *Vermont*, 377 U.S. 351, 385, 84 S. Ct. 1267, 12 L. Ed. 2d 370 (1964); *Crest Finance Co.* v. *United States*, 368 U.S. 347, 82 S. Ct. 384, 7 L. Ed. 2d 342 (1961); *Texas Oil & Gas Corp.* v. *United States*, 466 F. 2d 1040, 1045–46 (5th Cir. 1972). *See also* Coogan, *The Effect of the Federal Tax Lien Act of 1966 Upon Security Interests Created Under the Uniform Commercial Code*, 81 Harv. L. Rev. 1369, 1378–79 (1968); Kennedy, *supra* at 737; Burroughs, *supra* at 465–69. Similarly, Congress has not provided priority for SBA liens in noninsolvency cases: relaxation of the stringent choateness requirements also appears proper. Further, the same reasons that argue against the extension of the choateness doctrine to federal contractual liens would urge us to adopt a less stringent standard of choateness in this context.

Thus, Kimbell's lien could qualify as "choate." The 1966 and 1968 security agreements and financing statements provided the identity of the lienor and the property subject to the lien. Although Kimbell had not fixed the amount of its lien by reducing it to judgment before the SBA lien arose on January 21, 1971, *see infra*, it had terminated extensions of credit so that its accounts reflected the final amount of the claim secured by its security agreements with O.K. This could suffice to meet relaxed criteria applied to liens competing with federal contractual liens. *Cf. Crest Finance Co.*, *supra* (credit or secured by assignment of accounts receivable with perfected lien under state law had choate lien as against federal tax lien). *See also* Burroughs, *supra*, at 470.

[15] Other types of state liens—for taxes, for mechanics and materialmen, or for certain types of secured loans—present problems

text of competing state security interests arising under the U.C.C., we conclude that liens perfected under the UCC qualify to compete against federal liens under the federal "first in time, first in right" priority rules.[16] The UCC carefully prescribes the steps necessary to perfect a security interest. Perfection under the UCC provides many of the assurances of the existence of a lien required by the choateness doctrine—identity of the debtor, identity of the lienholder, and identity of the property serving as collateral. Further, the UCC embodies rules of nationwide applicability—all states but Louisiana have adopted it—assuring that federal contractual liens will not be subject to the idiosyncracies of particular state laws. *Cf. First National Bank v. SBA,* 429 F. 2d 280, 286 (5th Cir. 1970). The context provides our final reason: perfection under the UCC provides protection to the secured creditor against later-filed claims of other creditors; in

that we leave for another day. First, the manner of perfection of those liens is diverse—creating havoc with a nationwide program—and may not provide notice sufficient for federal entities to ascertain their existence before granting loans. Second, consideration of these loans for qualification under the federal "first in time, first in right" rule is complicated by the fact that several states, including Texas, either provide special priority for the liens, see *e.g.*, Tex.Tax.—Gen.Ann. art. 1.07(1) (1969) (preferred lien for state and city taxes), or allow subsequently perfected liens to relate back to the date the debt was incurred. See, *e.g.*, Tex.Rev.Civ.Stat.Ann. art. 5459 § 2(a) (Supp. 1976) (mechanic's liens have priority from date construction commences).

[16] In reaching our conclusion we do not apply state law—for we have previously concluded that federal law controls here—but we rather adopt portions of state law in order to fashion a proper federal rule. See *United States* v. *Terrey*, 554 F. 2d 685, 692 (5th Cir. 1977); *Ault* v. *Harris*, 317 F. Supp. 373, 376 (D. Alaska), *aff'd and opinion adopted*, 432 F. 2d 441 (9th Cir. 1970).

the absence of congressional mandate or persuasive policy reasons to the contrary, it should similarly protect secured creditors against later arising federal contractual liens.

Even given our conclusions that the choateness doctrine does not apply here and that perfection under the UCC will qualify a lien as "first in time," Kimbell must still establish that its lien was "first in time" under federal law. Its task is complicated because, although Kimbell had a perfected lien on the collateral, the indebtedness the lien secured results from future advances made after Republic made its loan to O.K. When the SBA bought into Republic's loan in 1971, it bought Republic's lien and for purposes of federal priority under "first in time, first in right," the SBA's lien "attached" when Republic's lien arose in 1969. *See United States v. Ekland,* 369 F. Supp. 1052, 1054–55 (S.D.Ill.1972). Under Texas law, as we have seen, the lien securing future advances dates from Kimbell's prior security interest. Does Kimbell's lien retain that date under federal common law and thus remain prior in time to the Republic-SBA lien?

Perhaps because of the pervasiveness of the choateness doctrine, we have found no federal case discussing the substantive content of the "first in time, first in right" rule with regard to future advances. Faced with the necessity of fashioning a federal common-law rule because of congressional silence on the subject, *see Clearfield Trust Co. v. United States* 318 U.S. 363, 376, 63 S. Ct. 573, 87 L. Ed. 838 (1943), we grapple with the problem by first examining the approach taken by the states.

Prior to the Uniform Commercial Code, the states adopted diverse rules on whether an optional (as opposed to an obligatory) future advance would relate back to take priority from the date of the

original security agreement. The majority rule was that optional advances made before the advancing creditor received actual notice of an intervening lien related back to the date of the original security interest. *See* Cohen, *The Future Advance Interest Under the UCC: Validity & Priority,* 10 B. C. Ind. & Comm. L. Rev. 1, 12 (1968); 59 C. J. S. *Mortgages* § 230(1)(1949); 55 Am. Jur. 2d *Mortgages* § 352 (1971). A minority of jurisdictions adopted what was known as the *Michigan* rule in which, although the prior lien was effective to secure the future advance, the lien was effective only from the date the future advance was made. Intervening encumbrances took priority over subsequent future advances. Cohen, *supra* at 12–13. Another minority view, based on older English precedent, held that optional future advances related back regardless of actual notice of intervening liens "for it was the Folly of the second Mortgagee, with Notice, to take such security." *Gordon v. Graham,* 22 Eng. Rep. 502, 2 Eq. Ca. Abr. 598 (1716). *See* Cohen, *supra* at 11. As we have seen, the ubiquitous U.C.C., at least with respect to competing security interests perfected by filing, adopted the third rule. *See, e.g.,* Tex. Bus. & Com. Code § 9.312 (e)(1) (1968) (Tex.U.C.C.).

Our brief survey of American jurisprudence evidences at least this: the trend of thought in American law rejects the *Michigan* rule and allows future advances secured by an earlier security agreement to take priority from the date of the earlier security agreement under some circumstances. We believe that federal common law should recognize this legal principle.[17] *Cf. United States v. State of Alabama,* 313

[17] The existence of various legal rules on future advances reflects the underlying conceptual problem of future advances. One

U.S. 274, 61 S. Ct. 1011, 85 L. Ed. 1327 (1941) (inchoate tax lien that became choate after United States purchased property gave due notice of liability and, when amount of tax was certain, related back to day lien imposed). Given that, however, we need go no further in crafting federal common law for this case [18] because under either the actual notice rule or the U.C.C. rule Kimbell's lien related back to its prior security agreement and was prior in time to the SBA's lien.

Kimbell's future advances relate back to and have the priority of its original security agreements with O.K. because at the time of the future advances Kimbell had no notice of the SBA's lien. Thus, under the stricter "actual notice" rule for relation back, Kimbell had no notice of the SBA's intervening interest. It is true that Kimbell was aware of Republic's lien and—so the record suggests—the SBA's guaranty of

---

view is that a security interest that provides for optional future advances creates a single lien when the interest is perfected. Further future advances may increase the amount that the lien secured, but the security interest itself is one and indivisible. A second view is that a security interest for optional future advances may complete most of the requisities of perfection and give notice of possible future advances but that a future advance under the agreement takes a discrete lien dating from the day of the advance. Comment, *Priority of Future Advances Lending Under the Uniform Commercial Code*, 35 U. Chi. L. Rev. 128, 136–38 (1967). The original U.C.C. weighed heavily in favor of the single interest theory, *see e.g.*, Tex. Bus. & Com. Code § 9.312 (e)(1) & Example 4 (1968) (Tex. U.C.C.), and the 1972 amendments endorse the single interest theory more strongly. *See, e.g.*, Tex. Bus. & Com. Code § 9.312(g) (Supp. 1976) (Tex. U.C.C.).

[18] Strong policy arguments favoring greater protection for the SBA counsel adoption of the actual notice rule while equally strong considerations—similar to the ones that argue against the choateness rule—urge adoption of the U.C.C. rule. We reserve the final resolution of this difficult decision for another day.

the loan the lien secured.[19] Yet under Texas law—the U.C.C.—this notice could not affect Kimbell's decision whether to advance funds because under state law its advances were secured by and took the priority of the 1966 and 1968 security agreements. It was only when the SBA bought into the note in February 1971 that Kimbell could have actual notice of the existence of a federal lien and the application of federal law. At oral argument the United States conceded that before it bought into Republic's note it had no lien. Without actual notice of another lien that could supersede the priority of its future advances under state law, Kimbell's advancements are secured by and take the priority of the 1966 and 1968 security agreements.

In summary, the SBA's purchase of 90% of Republic's loan to O.K. vested it with Republic's lien, and, in measuring priority under federal law, the SBA's lien attached when Republic's lien arose in 1969. All of Kimbell's future advances were made subsequent to Republic's loan, but the future advances are secured by the 1966 and 1968 security agreements and take priority from those dates. Thus, Kimbell's lien for inventory advances is prior in time to the SBA's lien, and Kimbell has priority in the proceeds from the sale of the three O.K. Supermarkets.

REVERSED.

---

[19] Kimbell's awareness of the SBA's guaranty did not suffice as actual notice that the SBA had a lien. At oral argument the United States admitted that it had no lien until Republic assigned its lien on January 21, 1971.

See *Lakeshore Apartments, Inc.* v. *United States*, 351 F. 2d 349, 353 (9th Cir. 1965); *City of New York* v. *United States*, 414 F. Supp. 90, 92 (E.D.N.H. 1975). *Cf. United States* v. *Marxen*, 307 U.S. 200, 205, 59 S. Ct. 811, 83 L. Ed. 1222 (1939) (United States as guarantor not a creditor in bankruptcy when note assigned it after petition filed); *In re Miller*, 105 F. 2d 926, 928–29 (2d Cir. 1939).

APPENDIX B

United States Court of Appeals for the Fifth Circuit

No. 75-4105

D. C. Docket No. CA 3-74-56 D

KIMBELL FOODS, INC., F/K/A KIMBELL MILLING COMPANY, D/B/A KIMBELL GROCERY COMPANY, PLAINTIFFS-APPELLANTS

v.

REPUBLIC NATIONAL BANK OF DALLAS AND UNITED STATES OF AMERICA, DEFENDANTS-APPELLEES

Appeal from the United States District Court for the Northern District of Texas

Before THORNBERRY and GEE, *Circuit Judges,* and MARKEY,[1] Chief Judge

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Texas, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, reversed;

It is further ordered that defendants-appellees pay to plaintiffs-appellants, the costs on appeal to be taxed by the Clerk of this Court.

August 12, 1977.

Issued as Mandate: November 2, 1977.

---

[1] Of the United States Court of Customs and Patent Appeals, sitting by designation.

APPENDIX C

In the United States District Court for the Northern District of Texas, Dallas Division

(Civil Action No. 3-74-56-D)

(Filed September 8, 1975)

KIMBELL FOODS, INC., A CORPORATION, F/K/A KIMBELL MILLING COMPANY, D/B/A KIMBELL GROCERY COMPANY, PLAINTIFF,

v.

REPUBLIC NATIONAL BANK OF DALLAS AND UNITED STATES OF AMERICA, DEFENDANTS, AND STATE OF TEXAS AND CITY OF DALLAS, INTERVENORS

MEMORANDUM OPINION

This suit concerns the relative priorities of various parties to $86,672.00, which is being held in escrow by Republic National Bank. Jurisdiction is based upon Title 28, United States Code, Section 2410, this suit being brought to quiet title and foreclose liens upon personal property in which the United States claims an interest.

It will be necessary to cover each of the conflicting claims in greater detail later, however, a brief rendition of the facts might be helpful at this point. The claim of the plaintiff, Kimbell Foods, stems from weekly inventory purchases made on open account by O.K. Super Markets, Inc., a supermarket chain that operated in Dallas, Texas. Kimbell Foods claims that this indebtedness was secured by future advance

clauses in security agreements executed by O.K. Super Markets in 1966 and 1968. The Republic Bank and the United States claim entitlement to the entire proceeds in escrow due to a default by O.K. Super Markets on a $300,000.00 Small Business Administration guaranteed loan made by Republic National Bank in February of 1969. Intervenors State of Texas and the City of Dallas are seeking sums owed by O.K. Super Markets for delinquent sales taxes. Additionally, the City of Dallas is asserting a small claim for delinquent ad valorem taxes on O.K. Super Markets' personal property.

As noted previously, all of these parties are asserting claims against funds being held in escrow by Republic National Bank. The source of these funds was a bulk sale of all the fixtures, equipment and inventory at three of O.K. Super Markets' stores. These stores were purchased on February 8, 1971, by Grand City Groceries, Inc., Pat H. Hood and Charles W. Logan.[1] The stores were sold pursuant to an agreement entered into on February 3, 1971, between O.K. Super Markets and the Republic National Bank and approved as to form and substance by the Small Business Administration and Kimbell Foods. This agreement was the result of a meeting held on December 30, 1970, between a representative from the bank, the acting Regional Director of the Small Business Administration (hereinafter referred to as the SBA) and Mr. Harold Kindle, the President of O.K. Super Markets. This agreement allowed O.K. Super Markets to find bulk purchasers for the stores and in return the bank released the debtor to the extent of $95,000.00 owing on the $300,000.00 note. The agreement further provided that the bank would hold the total sum in escrow pending voluntary settlement or court adjudication of the claims of the SBA, Republic Bank and Kimbell Foods.

[1] Grand City Groceries purchased the collateral located at 3026 Grand Avenue in Dallas for $30,000.00, which represented $18,000.00 for inventory and $12,000.00 for fixtures, equipment and other property. The O.K. Super Market collateral located at 3805 Kiest Boulevard in Dallas was sold to Pat Hood for the same price as the above. Charles Logan bought the collateral at 1903 South Ervay in Dallas for $35,000.00, $21,000.00 being attributable to inventory and $14,000.00 for fixtures, equipment and other property.

Kimbell Foods contends that its claim for $24,445.37[2] is first and prior to the other claims of the parties herein. O.K. Super Markets executed three security agreements and financing statements in favor of Kimbell Foods to secure the payment of certain notes. The first of these agreements was executed on August 30, 1966, to secure a note in the sum of $20,000.00 and it was duly filed with the Secretary of State on September 2, 1966. The list of collateral which was attached to the agreement consisted of various types of equipment that would be needed in the operation of food stores. The agreement had a standard printed "dragnet" clause which said that the security interest in the listed collateral was also given to secure all other future advances to the debtor.[3] Subsequently, on April 17, 1968, and November 14, 1968, additional security agreements and fi-

[2] On February 4, 1972, Kimbell Foods obtained a judgment against O.K. Super Markets and others in the 96th Judicial District Court of Tarrant County, Texas, in the sum of $18,258.57 principal, $1,186.80 interest and $5,000.00 in attorney's fees.

[3] The August 4, 1966 agreement provided as follows: * * * "said security interest also being given to secure the payment of all other indebtedness at any time hereafter owing by Debtor to Secured Party as well as the discharge of all obligations imposed upon Debtor hereunder."

nancing statements were entered into between O.K. Super Markets and the plaintiff, securing a note in the sum of $27,000.00. These were both filed with the Secretary of State. New collateral was listed in each of these agreements and each contained an identical future advance clause as the 1966 security agreement and financing statement. These future advance clauses are said by Kimbell Foods to encompass the later inventory purchases on open account and, therefore, the security interest in the inventory is perfected as of the first filing in 1966. No termination statements have been filed on any of these security agreements.

The United States is involved in this case due to the fact that the SBA guaranteed 90% of a $300,000.00 loan made by Republic National Bank to O. K. Super Markets on February 12, 1969. This loan was sought and was needed by O.K. Super Markets because consumer boycotts at some of their stores caused heavy losses. Prior to this loan, the bank and the SBA tried to get some of the larger creditors of O.K. Super Markets to guarantee the loan in proportion to the amount owed each creditor by O.K. Super Markets but this effort proved to be unsuccessful.

To secure this $300,000.00 note O.K. Super Markets executed a security agreement and financing statement in favor of Republic Bank, which provided that the bank would have a security interest in all of the debtor's machinery, fixtures, equipment and inventory. A financing statement had been previously filed with the Secretary of State on August 7, 1968, but the financing statement was refiled on February 18, 1969, following the making of the loan.

Even with this boost, the financial difficulties of O.K. Super Markets continued, and they defaulted on the note with the bank. Therefore, the United

States on February 3, 1971, paid Republic National Bank 90% of the outstanding indebtedness, which totaled $252,331.93 on that date. The note and the financing statement were assigned to the SBA and the assignment was filed with Secretary of State on January 21, 1971.

When the SBA guaranteed loan was made by Republic National Bank on February 12, 1969, there was a balance owing on the April 17, 1968, note between O.K. Super Markets and Kimbell Foods in the sum of $24,893.10. This was the only outstanding note balance remaining on that date, however, there was a running balance on the open account for inventory purchases. Out of the $300,000.00 loaned to O.K. Super Markets, $24,893.10 was immediately paid to the plaintiff on February 12, 1969, thereby extinguishing the last remaining promissory note balance.

The claim of the State of Texas and the City of Dallas is principally for sales taxes that were due and payable by O.K. Super Markets when they sold the stores to Charles Logan, Pat Hood and Grand City Groceries. The State is seeking $29,887.51 in taxes, penalties and interest, and the City of Dallas claims $12,229.64. The intervenors contend that under State law they have a preferred lien which is first and prior to all others on all property purchased from O.K. Super Markets. They further contend that their liens follow the proceeds in escrow received from the sale of the stores.

Although recordation was not required until January 1, 1970, for a valid tax lien on personalty, the State did record its tax liens prior to that date. After this suit was filed, the State and City obtained a default judgment in the District Court of Travis

County, Texas, on February 13, 1973, against O.K. Super Markets for past due taxes.

Aside from these sales taxes, the City of Dallas claims $2,530.10 for delinquent ad valorem personal property taxes, penalties and interest for the years 1969 through 1972. These ad valorem tax liens have not been recorded nor has a judgment been obtained thereon.

The above is a summary of the claims of each of the parties. The Court will now discuss the law applicable to this case.

The initial inquiry for this Court is whether state or federal law or a combination of both controls the disposition of these conflicting claims. Jurisdiction is based upon a federal statute, 28 U.S.C.A. §2410, and it has long been the rule that federal law applies when a debt owing the United States is involved. *United States* v. *Security Trust & Savings Bank*, 340 U.S. 47 (1950); *Clearfield Trust Company* v. *United States*, 318 U. S. 363 (1943); *United States* v. *General Douglas MacArthur Sr. Vil., Inc.*, 470 F. 2d 675 (2d Cir. 1972); *Texas Oil & Gas Corporation* v. *United States*, 466 F. 2d 1040 (5th Cir. 1972); *United States* v. *City of Albuquerque, New Mexico*, 465 F. 2d 776 (10th Cir. 1972); *United States* v. *Oswald and Hess Company*, 345 F. 2d 886 (3d Cir. 1965); *In re Lehigh Valley Mills, Inc.*, 341 F. 2d 398 (3d Cir. 1965); *W. T. Jones and Company* v. *Foodco Realty, Inc.*, 318 F. 2d 881 (4th Cir. 1963). The reason for this rule is that the United States, in exercising its governmental functions must be protected by a uniform federal law and should not be subjected to differing rules of the various states. *Clearfield Trust Co.* v. *United States*, supra. Therefore, federal law applies to a consideration of all the claims in this case, unless of course there is a

federal statute directing this Court to apply state law. See Annot. 17 A.L.R. Fed. 874 (1973).

The federal rule for determining the relative priority between a federal lien and a state created lien is first in time is first in right. *United States* v. *New Britain*, 347 U.S. 81 (1954). In applying this rule, the Supreme Court has consistently held that for a non-federal lien to be entitled to priority it must be both earlier in time and be choate at the time the federal lien arises. *United States* v. *New Britain*, supra; *United States* v. *Waddill Company*, 323 U.S. 353 (1945); *United States* v. *Pioneer American Ins. Company*, 374 U.S. 84 (1963). A non-federal lien meets the choateness test only if the identity of the lienor, the property subject to the lien, and the amount of the lien are established. *United States* v. *New Britain*, supra at 84; *United States* v. *Pioneer American Ins. Company*, supra at 89; *United States* v. *General Douglas MacArthur Sr. Vil., Inc.*, supra at 678. The last requirement that the amount of the lien be certain is only established if there is no further opportunity for contesting the amount of the lien. Thus, the lienor must have either obtained a judgment or the lien must be enforceable by summary proceeding. *United States* v. *Acri*, 348 U.S. 211 (1955); *United States* v. *Liverpool & London Ins. Company*, 348 U.S. 215 (1955); *In re Lehigh Valley Mills, Inc.*, supra. With few exceptions no common law, equitable, or statutory lien can meet the federal standard of choateness unless the lienor's claim has been reduced to judgment. Plumb, *Federal Liens and Priorities—Agenda for the Next Decade*, 77 Yale L. J. 228, 230 (1967).

It has been said that the interim steps of filing and recording a private or statutory lien, without obtain-

ing a final judgment enforcing the lien against the property serves "merely as a caveat of a more perfect lien to come."[4] *United States* v. *Vorreiter,* 355 U.S. 15 (1957) (prior recorded mechanics' lien); *United States* v. *Hulley,* 358 U.S. 66 (1958) (prior recorded materialman's lien). Thus, in *United States* v. *White Bear Brewing Company,* 350 U.S. 1010 (1956), a federal tax lien was held entitled to priority over a state mechanic's lien, even though the mechanics' lien was specific under state law, it had been recorded for a certain amount, and suit had been instituted *before* the federal tax lien arose. The law that has developed around federal tax liens has been consistently applied to federal mortgage liens. *United States* v. *General Douglas MacArthur Sr. Vil., Inc.,* supra (HUD mortgage lien); *T. H. Rogers Lumber Company* v. *Apel,* 468 F. 2d 14 (10th Cir. 1972) (FHA mortgage lien); *In re Lehigh Valley Mills, Inc.,* supra (SBA mortgage lien).

Further, there is authority for the proposition that a private or statutory state lien cannot be considered choate unless it has attached to certain property *by reducing it to possession* on the theory that the United States has no claim against property no longer in the possession of the debtor. *United States* v. *Gilbert Associates,* 345 U.S. 361, 366 (1953); *W. T. Jones and Company* v. *Foodco Realty, Inc.,* supra at 887.

Although a state may characterize a lien as choate and specific, this is not conclusive, and this determination is always subject to reexamination by a federal court. *United States* v. *New Britain,* supra; *Illinois* v. *Campbell,* 329 U.S. 362 (1946); *Texas Oil & Gas*

[4] Justice Cardozo first used this expression in *New York* v. *Maclay,* 288 U.S. 290, 294 (1933).

Corporation v. *United States,* supra at 1050. Thus, the Fifth Circuit, in the *Texas Oil & Gas* case stated:

> * * * In the instant case, it is true that the bank had done all it could do under the Uniform Commercial Code to secure its interest in taxpayor-debtor's accounts receivable. However, that conclusion simply does not answer the case law as it has developed in the area of tax liens. However "complete" a lender's perfection may be under state recording laws and however "specific" state law might deem that interest to be, it is federal law that determines the extent to which that state determination will protect a private lien from a Federal tax lien. 466 F. 2d at 1051.

Of course, if the state itself would characterize a lien as inchoate, then that determination would be almost conclusive. *Illinois* v. *Campbell,* supra.

From these cases, it is clear that the plaintiff and the intervenors must show that their liens attached and were perfected under the law of Texas *and* were choate under federal law prior to the time the SBA lien became choate. *Texas Oil & Gas Corporation* v. *United States,* supra at 1052. The participation of the SBA in the Republic Bank loan was evident from the face of the note, therefore, their lien would be perfected as of the time of the February 18, 1969, filing. The SBA's claim to priority would be unaffected by the fact that formal assignment by the bank did not occur until approximately a year later. See *Director of Revenue, State of Colorado* v. *United States,* 392 F. 2d 307 (10th Cir. 1968); *W. T. Jones and Company* v. *Foodco Realty, Inc.,* supra; *Texas Oil & Gas Corporation* v. *United States,* supra.

The continued validity of the federal choate lien test was questioned by two decisions which construed the effect of the Federal Tax Lien Act of 1966 (P.L. 89–719, 80 Stat. 1125), on federal tax and mortgage liens. See *Ault* v. *Harris,* 317 F. Supp. 373 (D. Alaska 1968), aff'd per curiam (by adoption) 432 F. 2d 441 (9th Cir. 1970); *Connecticut Mutual Life Insurance Company* v. *Carter,* 446 F. 2d 136 (5th Cir. 1971). In *Connecticut Mutual* an inchoate lien for attorney's fees contained in a first mortgage was entitled to priority over a FHA mortgage lien where the FHA expressly took their second mortgage subject to first mortgage. Over a strong dissent by Judge Rives, the Court held that:

> * * * the statute [Federal Tax Lien Act of 1966] diminishes the validity of the choate lien test in the important field of taxation where the doctrine originated. It would indeed be anomalous and contrary to our view of congressional intent to allow the FHA operating as a money-lending agency to prevail in a situation where the government as holder of a tax lien would have an inferior security interest. 446 F. 2d at 139.[5]

The rationale of the *Ault* and *Connecticut Mutual* cases seems to be that since Congress chose to subordinate federal tax liens in certain specified instances that they intended to subordinate all other federal liens. However, at the same time these courts recognized that Congress had spoken only to tax liens, and

[5] The *Connecticut Mutual* decision prompted one District Court to remark that, "The prognosis for the choate lien test is guarded following the decision in Connecticut Mutual Life Insurance Co. v. Carter, * * *." *Nova Univ. of Advanced Tech., Inc.* v. *Motor Vessel Gypsy,* 331 F. Supp. 721, 722 (S.D. Fla. 1971).

other federal liens were not specifically covered by the statute.

This rationale has been questioned by two later decisions of the Second and the Tenth Circuit Courts of Appeal. In *T. H. Rogers Lumber Company* v. *Apel,* supra, the Court in construing the priorities between a FHA mortgage lien and mechanics' and materialman's liens stated:

> The fact that Congress chose to subordinate tax liens furnishes no evidence that it intended to subordinate all other federal liens to interests created by the laws of the individual states. The 1966 Act applied only to tax debts, and the reports of the House and the Senate speak only of subordinating federal unrecorded tax liens to mechanics' liens. There is not the slightest indication of the intent of Congress to subordinate other claims. 468 F. 2d at 18.

The Second Circuit in *United States* v. *General Douglas MacArthur Sr. Vil., Inc.,* supra, also concurred with the view of the Tenth Circuit:

> We are unable to conclude, however, that a Congressional enactment, carefully drawn, which affects the priority of federal *tax* liens leaves the courts free to disregard prior precedents and thus to broadly extend the scope of the statute's principle to other unspecified areas which, though somewhat analogous, were simply not addressed by the Congress. Although Judge Weinstein's carefully considered opinion forcefully argues that such an extension represents the best balancing of competing interests, his discussion would more appropriately be addressed to Congress. But where Congress has considered proposals of a highly qualified committee and has enacted

> specific, carefully-tailored legislation, it would be inappropriate for a court to undertake piecemeal extensions of the principles reflected in this legislation merely because it is desirable, especially in view of the fact that Congress saw fit not to provide for these extensions. * * * In view of the national scope of the problem and the absence of legislation extending the priority of property tax liens beyond the confines of the federal tax lien, the rule of first in time, first in right, followed by the Supreme Court, must apply. 470 F. 2d at 678–679.[6]

Additionally, the Fifth Circuit has now dispelled any thought that the federal choate lien test was abolished by the *Connecticut Mutual* case. In *Texas Oil & Gas Corporation* v. *United States,* supra, the Court stated that:

> * * * It does not appear to this Court that the 1966 amendments to the tax lien statutes did away with the choateness doctrine of United States v. Security Trust, *supra.* The Supreme Court expressly rejected that inference after earlier amendments to the tax lien statutes. *See* United States v. Pioneer American, supra. 466 F. 2d at 1053.

Therefore, this Court concludes that the federal choate lien test is still applicable to the claims of the parties herein and the *Connecticut Mutual* case is limited to the particular set of circumstances with which that Court was faced. The Court will now examine the claims of the parties with the law previously discussed as a foundation.

---

[6] See also, *H. B. Agsten & Sons, Inc.* v. *Huntington Trust & Savings Bank*, 388 F. 2d 156 (4th Cir. 1967); *Aetna Insurance Co.* v. *United States*, 456 F. 2d 773 (Ct. Cl. 1972).

As noted previously, the plaintiff's claim is for purchases made by O.K. Super Markets for inventory sold on an open account. The claim of Kimbell Foods, and the parties have so stipulated, represents charges for goods sold to O.K. Super Markets subsequent to the date the SBA guaranteed loan was made on February 12, 1969, and the Court determines that these charges were also subsequent to the February 18th filing of the financing statement.

Although the Court has found that the SBA security interest attached and was perfected in February of 1969, this is not of primary importance in the consideration of the plaintiff's cause of action vis-a-vis that of the United States. Because even if the government lien was not choate until the filing of the assignment on January 21, 1971, the Court would still have to conclude that the claim of the United States would be prior in time. The elements for a private choate lien are that the identity of the lienor, the property subject to the lien and the *amount* of the lien be certain. As previously discussed, the last requirement is satisfied only when there is no further opportunity to judicially challenge the amount of the lien. This occurred when Kimbell Foods reduced its lien to judgment on February 4, 1972, some two years after the SBA guaranteed loan was made to O.K. Super Markets and more than one year after the assignment was filed. Therefore, on this ground alone the claim of the United States could be entitled to priority.

However, there is another and perhaps more basic reason for the subordination of the plaintiff's claim to that of the United States. Under the choate lien test, if the State of Texas would refuse to recognize

the lien as choate and valid, then that determination would be almost conclusive upon this Court. As previously stated, Kimbell Foods contends that under state law the future advance clauses found in the 1966 and 1968 security agreements and financing statements apply to and secure the purchases made by O.K. Super Markets on open account.

This Court is convinced that a Texas Court would conclude that the future advance clauses on the printed forms would not secure the later purchases on open account. Prior to the adoption of the Uniform Commercial Code, Texas courts have had occasion to construe these "dragnet clauses." These Courts stress that these provisions will apply only to future indebtedness that was clearly contemplated by the parties at the time of the making of the original agreement. When the agreement provides that the collateral secures, "all other indebtedness of any kind arising between the parties," this is construed to mean future indebtedness of the same nature as that previously described in the instrument. See *Wood* v. *Parker Square State Bank,* 400 S.W. 2d 898 (Tex. 1966); *Moss* v. *Hipp,* 387 S.W. 2d 656 (Tex. 1965); *Finger Furniture Company* v. *Chase Manhattan Bank,* 413 S.W. 2d 131 (Tex. Civ. App.—San Antonio, 1967, writ ref'd n.r.e.).

Section 9-204(e) of the Uniform Commercial Code, *Tex. Bus. & Comm. Code Ann.* § 9.204(e) (1968), allows the creation of clauses in an original security agreement that would secure future advances made to the original debtor. However, these clauses will be closely scrutinized and will be enforced only to the extent that future transactions or liabilities sought to be secured were in the clear contemplation of the parties. The reason for this rule is that this device can be

abused when a lender seeks to bring in claims against the debtor that were not originally contemplated by the parties. *John Miller Supply Co., Inc.* v. *Western State Bank,* 10 U.C.C. Rep. Ser. 1329, 55 Wis. 2d 385 (Wis. Sup. 1972). The future advances must be of the same class as the primary obligation and be so related that the consent of the debtor may be inferred. 2 Gilmore, *Security Interests in Personal Property* § 35.5 (1965); *In re Eshleman,* 10 U.C.C. Rep. Ser. 750 (E.D. Pa. 1972); *John Miller Supply Co., Inc.* v. *Western State Bank,* supra; *National Bank of Eastern Arkansas* v. *Blankenship,* 177 F. Supp. 667 (E.D. Ark. 1959).

The true intention of the parties is really the sole and controlling factor in determining whether the future advances were covered by the original agreement. If the parties intended to deal on a single loan basis, intending an entirely new transaction each time, then each new agreement would have to be reperfected. *John Miller Supply Co., Inc.* v. *Western State Bank,* supra; *In re Sanelco,* 7 U.C.C. Rep. Ser. 65 (M.D. Fla. 1969); *In re Glawe,* 6 U.C.C. Rep. Ser. 876 (E.D. Wis. 1969); *Coin-O-Matic Service Co.* v. *Rhode Island Hospital Trust Co.,* 3 U.C.C. Rep. Ser. 1112 (R.I. 1966).

After reviewing the facts of this case, the Court is of the opinion that it was not the intention of O.K. Super Markets and Kimbell Foods for the later purchases on open account to be secured by the future advance clauses in the 1966 and 1968 agreements. The parties treated each as a separate and distinct agreement and each was for a specific nonrecurring purpose. The 1966 agreement was entered into to enable O.K. Super Markets to expand to a new location by delaying the payment of a balance owing Kimbell

Foods. This was not related in any way to the later inventory purchases on open account by O.K. Super Markets. Likewise, the 1968 agreements were entered into for the purpose of delaying the payment of a balance owing Kimbell Foods so that O.K. Super Markets could pay off a debt owing Associated Grocers, Inc. The later purchases on open account were simply not of the same class as the primary indebtedness. As shown by the testimony of the president of O.K. Super Markets, the parties intended each transaction to be separate and distinct and each agreement was renegotiated and reperfected. It is the judgment of this Court that the parties did not intend for the "boiler plate" future advance clauses in the three agreements to secure the later purchases on open account.

For this reason, as well as the fact that the lien of the plaintiff was not choate at the time the lien of the United States arose, the Court finds that the claim asserted herein by the United States should prevail over that of Kimbell Foods.

State and City Sales Tax Liens

Against the proceeds held in escrow, the State of Texas and City of Dallas claim certain sums for sales taxes that were due and payable by O.K. Super Markets when the three stores were sold in 1971. Although acknowledging that federal law is applicable to this case, the intervenors contend that there is a federal statute, 15 U.S.C. § 646,[7] which subordinates

[7] 15 U.S.C.A. § 646 provides as follows: "Any interest held by the Administration in property, as security for a loan, shall be subordinate to any lien on such property for taxes due on the property to a State, or political subdivision thereof, in any case

a SBA lien to state and city taxes that are accorded priority under state law.

It is true that under the law of Texas, Article 1.07 of Title 122A, *Tex. Rev. Civ. Stat. Ann.*, the State and City have a preferred lien for taxes, penalties and interest that is first and prior to all others. Under state law these liens attach to all the property of the debtor and they become effective when the taxes are due and owing. *State* v. *Smith*, 434 S.W. 2d 342 (Tex. 1968); *Pecos County State Bank* v. *State*, 468 S.W. 2d 867 (Tex. Civ. App.—Austin, 1971, writ ref'd n.r.e.).

If the intervenors are entitled to pursue the proceeds into the escrow account, and if §646 is applicable to their claim, then it is clear that they would stand first in line. However, if §646 is inapplicable, then under the choate lien test the intervenors would only be entitled to those taxes that became due and payable by February of 1969, when the SBA lien became choate. This is assuming of course that the intervenors are entitled to pursue the proceeds of the private sale of the three stores.

The problem with the intervenors' argument as it pertains to § 646 is that the decisions construing this section have been uniform in their holdings that general taxes, such as sales taxes, are not taxes due on specific property and thus do not come within the ambit of §646. See *United States* v. *City of Albuquerque, New Mexico*, supra; *Director of Revenue* v. *United States*, supra; *United States* v. *Clover Spinning Mills Company*, 373 F. 2d 274 (4th Cir. 1966); Annot., 17 A.L.R. Fed. 874 (1973). Even

where such lien would, under applicable State law, be superior to such interest if such interest were held by any party other than the United States."

where the liens asserted are for ad valorem taxes and thus entitled to priority, the Courts have disallowed claims for penalties and interest under §646. *United States* v. *Consumers Scrap Iron Corporation,* 384 F. 2d 62 (6th Cir. 1967); *United States* v. *Christensen,* 218 F. Supp. 722 (D. Mont. 1963).

Aside from the questions under § 646, the government makes a strong attack on the intervenors' right to assert their liens against the proceeds held in escrow. After reviewing the applicable authorities, the Court believes that the position taken by the United States is correct and finds that the intervenors are not entitled to assert their liens against the proceeds held in escrow.

As noted previously, these proceeds are from the sale of three stores, which were sold pursuant to a written agreement entered into between Republic Bank and O.K. Super Markets and approved by the United States and Kimbell Foods. It was a contract with consideration flowing both ways and it was entered into to obtain funds for the settlement of the conflicting claims of the parties to the agreement.

Generally it may be said that a lien can follow the proceeds of the sale of property where the lien has been "destroyed" by either wrongful conversion or sale to an innocent purchaser for value. However, if the lien is not destroyed then the lienor has no right to the proceeds and the lien must follow the property. 51 Am. Jur. 2d Liens § 60 (1970); 33 C.J.S. Executions § 248 (1942).

Here, the liens held by the State and City were not extinguished or destroyed by the bulk sale of the collateral. Article 20.09 of Title 122A, *Tex. Rev. Civ.*

Stat. Ann., provides that the purchaser of a business or stock of goods must withhold a sufficient amount of the purchase price to cover the sales taxes owed by the vendor. If he fails to withhold such an amount, he becomes personally liable. It is also clear that the lien on property purchased from O.K. Super Markets is still valid and enforceable against the property in the hands of the purchasers. See *Pecos County State Bank* v. *State,* supra.

The State entered into certain releases with the purchasers of the stores. While these agreements released the purchasers from *personal liability,* they expressly provided that they did not "* * * release any claim or lien on any property bought from O.K. Super Markets, Inc. * * *." These purchasers cannot be classified as bona fide purchasers who are protected from the tax liens, because they purchased the property with full knowledge of the existence of such liens. For these reasons, the Court concludes that the intervenors are not entitled to a portion of the proceeds being held in escrow by Republic Bank for sales taxes, penalties and interest.

AD VALOREM TAXES OF THE CITY OF DALLAS

The intervenor City of Dallas is asserting a claim for delinquent ad valorem personal property taxes that were owing to the City and the Dallas Independent School District for the years 1969, 1970, 1971 and 1972, when the stores were sold by O.K. Super Markets. The city seeks a total of $2,530.10 which represents $1,933.57 in delinquent taxes and $596.53 in penalties and interest.

Of course, if the intervenor is entitled to pursue the proceeds, then 15 U.S.C.A. § 646, would subordinate the claim of the United States to this ad valorem tax claim because these are taxes due on specific property. See Annot. 17 A.L.R. Fed. 874 (1973). In this regard, Chapter 19, Section 14 of the Charter of the City of Dallas gives priority to ad valorem taxes over all other claims.[8] However, the Court entertains some doubt as to whether the Dallas Independent School District would have a specific statutory lien on personal property. See *City of San Marcos* v. *Zimmerman,* 361 S.W. 2d 929, 935 (Tex. Civ. App.—Austin, 1962, writ ref'd n.r.e.). The Court also would question whether the City of Dallas is entitled to assert a claim on behalf of a separate legal entity that is not a party to this suit.

However, it is not necessary to make these determinations because the Court feels that the City of Dallas is not entitled to pursue the proceeds in escrow. Just like the liens for sales taxes, the City's lien for ad valorem taxes was not destroyed by the bulk sale of the collateral, and the City is entitled to pursue the subject property into the hands of the purchasers. See *Pecos County State Bank* v. *State,* supra. Pursuant to Article 1060a, *Tex. Rev. Civ. Stat. Ann.,* a city or school district is given the right to employ any of the previously discussed methods for the collection of taxes that are available to the State or a county. See 54 Tex. Jur. 2d Taxation § 142 n. 1. Therefore, the Court concludes that the City of Dallas is not entitled to assert the claim for ad valorem taxes against the proceeds in escrow.

[8] This Charter provision provides as follows: "A lien is hereby created on all property, personal and real in favor of the City of Dallas, for all taxes, ad valorem, occupation or otherwise. Said lien shall exist from January 1st in each year until the taxes are paid. Such lien shall be prior to all other claims, and no gift, sale, assignment or transfer of any kind, or judicial writ of any kind, can ever defeat such lien, but the director of revenue and taxation may pursue such property, and whenever found may seize and sell enough thereof to satisfy such taxes."

CONCLUSION

In summary, the Court finds that the United States is entitled to the entire sum being held in escrow by the Republic National Bank of Dallas. The United States prevails over Kimbell Foods for two reasons. In the first place, the lien asserted by the plaintiff was not sufficiently specific to satisfy the federal choate lien test until after the lien of the United States became choate. Secondly, the future advances of inventory on open account were not secured by the 1966 and 1968 security agreements. As to the tax claims of the intervenors, the Court concludes that pursuant to state statute these intervenors have full recourse against the bulk purchasers of the stores and the property purchased. Therefore, these tax liens were not destroyed by the sale of the property and the intervenors have no right to pursue the proceeds in escrow.

Judgment will be entered in accordance with the findings made herein.

Signed and entered this 5th day of September, 1975.

WILLIAM M. STEGER,
United States District Judge.

In the United States District Court for the Northern District of Texas, Dallas Division

(Civil Action No. 3-74-56-D)

Filed October 1, 1975

KIMBELL FOODS, INC., A CORPORATION, F/K/A/ KIMBELL MILLING COMPANY, D/B/A/ KIMBELL GROCERY COMPANY, PLAINTIFF,

v.

REPUBLIC NATIONAL BANK OF DALLAS AND UNITED STATES OF AMERICA, DEFENDANTS, AND STATE OF TEXAS AND CITY OF DALLAS, INTERVENORS.

JUDGMENT

The above entitled cause came on regularly for trial before the Court without a jury, after due notice to all parties, and, after hearing the evidence and argument of counsel and considering the pleadings and briefs, the Court rendered its decision on the 5th day of September, 1975, by its Memorandum Opinion, which was filed on the 8th day of September, 1975, and in which appeared the findings of fact and conclusions of law of the Court.

It is, therefore, ORDERED, ADJUDGED, and DECREED that the Plaintiff, Kimbell Foods, Inc., f/k/a/ Kimbell Milling Company, d/b/a/ Kimbell Grocery Company, is not entitled to any portion of the sum held in escrow by the Republic National Bank of Dallas pursuant to the agreement of February 3, 1971, between the said Bank and O.K. Super Markets, Inc., and approved as to form and substance by

the Small Business Administration of the United States of America and the said Kimbell Foods, and all relief sought by the said Plaintiff against Republic National Bank of Dallas and the United States of America is denied.

It is further ORDERED, ADJUDGED, and DECREED that the Intervenors, the State of Texas and the City of Dallas, are not entitled to any portion of the sum held in escrow by the Republic National Bank of Dallas pursuant to the aforesaid agreement of February 3, 1971, and all relief sought by the said Intervenors against Republic National Bank of Dallas and the United States of America is denied.

It is further ORDERED, ADJUDGED, and DECREED that all sums held in escrow by the Republic National Bank of Dallas pursuant to the aforesaid agreement of February 3, 1971, the said sum being $100,836.03 as of September 15, 1975, be recovered by and paid over to the Defendant, the United States of America, pursuant to the aforesaid Memorandum Opinon of this Court.

It is further ORDERED, ADJUDGED, and DECREED that the Defendants, the United States of America and Republic National Bank of Dallas, have and recover the costs of this proceeding from the Plaintiff, Kimbell Foods, Inc.

Entered this 29th day of September, 1975.

WILLIAM M. STEGER,
United States District Judge.

APPENDIX D

UNITED STATES COURT OF APPEALS,
FIFTH CIRCUIT,
OFFICE OF THE CLERK,
New Orleans, La., October 25, 1977.

To all parties listed below:

No. 75-4105—*Kimbell Foods, Inc., Etc.* v. *Republic Nat'l. Bank of Dallas, et al, The State of Texas, et al.*

DEAR COUNSEL: This is to advise that an order has this day been entered denying the petition( ) for rehearing,** and no member of the panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the petition( ) for rehearing en banc has also been denied.

See Rule 41, Federal Rules of Appellate Procedure for issuance and stay of the mandate.

Very truly yours,
EDWARD W. WADSWORTH,
Clerk.
BRENDA M. HAUCK,
Deputy Clerk.

**On behalf of appellee, U.S.A.

U.S. GOVERNMENT PRINTING OFFICE: 1978